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Samad Mohamed Sulthan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–142 OF 2011
APANDI ALI, MAH WENG KWAI JJCA AND ZAWAWI SALLEH J
5 DECEMBER 2012

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Criminal Law — Dangerous drugs — Trafficking — Appellant arrested at International Arrival Hall of KLIA by customs officers — Appeal against conviction — Whether drug exhibits produced at trial were same exhibits seized from appellant — Whether appellant was innocent carrier — Whether trial judge had made proper findings of fact and applied relevant law correctly — Whether appellant's defence had been considered by trial judge

D

Evidence — Exhibits — Break in chain of evidence — Seal on box containing drug exhibits broken — Whether drug exhibits had been tampered with

E

Evidence — Statement — Cautioned statement — Appellant repeated what he said in cautioned statement in his oral evidence — Whether statement could be taken to be corroborative of his oral evidence

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The appellant, an Indian national, had arrived in Malaysia on a flight from Mumbai. At the international arrival hall of the Kuala Lumpur International Airport (KLIA) customs officers had checked the contents of a box that the appellant was carrying into Malaysia. The box was found to contain 14 jewellery exhibitor stands, which when pried open were found to contain 14 packets of a white powdery substance, which a chemist later confirmed to be 3,998.5g of ketamine, a dangerous drug listed under the Dangerous Drugs Act 1952 ('the Act'). The appellant was arrested and charged for trafficking in 2,600.7g of heroin, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). On arrest the appellant gave a cautioned statement to the customs officers that he was an innocent carrier of the jewellery stands on behalf of a friend named Ismail from Mumbai and that no knowledge that the jewellery stands contained drugs. The prosecution contended that the appellant was in possession and control of the drugs when at the customs counter at the KLIA, had knowledge of the nature of the drugs and was trafficking in the drugs. The appellant's defence at trial was a repeat of what he had said in his cautioned statement. The trial judge invoked the presumption under s 37(d) of the Act and found the appellant guilty of trafficking in the

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drugs. This was the appellant's appeal against his conviction and death sentence. A

Held, dismissing the appeal:

(1) Although the seal of the Chemistry Department that was placed on the box was found broken before the drugs were produced as exhibits in court, it had not been established as to how the seal came to be broken. The evidence showed that apart from the broken seal on the box, the Chemistry Department's seal on the 14 individual packets recovered from the jewellery stands were not damaged at all. Further, the drugs could be identified by the signature on the packets containing the drugs. Thus, it was clear from the evidence that there had been no tampering or interference with the drug exhibits or that there had been a break in the chain of custody of the exhibits as suggested by the appellant. The drug exhibits produced in court were the same exhibits that were analysed by the chemist (see para 15). B C D

(2) The appellant's contention that he was an innocent carrier was rightly rejected by the trial judge. It was inconceivable that the appellant's friend Ismail would ask the appellant to carry the jewellery stands without informing him to whom he was to deliver the stands to or who would be collecting them from him. Although the appellant had repeated what he said in his cautioned statement in his oral evidence, it is trite that the statement could not be taken to be corroborative of his oral evidence (see para 17). E F

(3) Based on the trial judge's grounds of judgment it was clear that she had considered the defence of the appellant carefully and in detail. The trial judge had dealt with the defence appropriately before arriving at the conclusion that the conduct of the appellant did not make much commercial sense in the circumstances. The trial judge's statement that the appellant had failed to call a witness in his defence was unfortunate, since it is trite that an accused did not bear the burden of having to call any witness in his defence. However, in the circumstances of this case the trial judge's statement was not fatal to the prosecution's case, especially as the trial judge had stopped short of invoking any adverse inference against the appellant (see para 18). G H

(4) On the totality of the evidence, the prosecution had proved a case of direct trafficking beyond reasonable doubt by the appellant, by transporting the drugs from Mumbai to Kuala Lumpur under s 2 of the Act. The evidence, namely the appellant's passport, his air ticket, boarding pass and luggage tag, pointed to the appellant alone having transported the drugs to KL. As such, the appellant was in physical I

possession of the drugs which were concealed in the jewellery stands. Thus, the conviction and sentence imposed by the trial judge were confirmed (see para 21).

[Bahasa Malaysia summary

Perayu, warganegara India, telah tiba di Malaysia melalui penerbangan dari Mumbai. Di lapangan ketibaan antarabangsa di Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA) pegawai-pegawai kastam telah memeriksa isi kandungan sebuah kotak yang telah dibawa oleh perayu ke Malaysia. Kotak itu mengandungi 14 tempat letak barang kemas, yang apabila dibuka mempunyai 14 paket bahan serbuk putih, yang kemudiannya disahkan oleh ahli kimia sebagai 3,998.5g ketamine, sejenis dadah berbahaya yang tersenarai di bawah Akta Dadah Berbahaya 1952 ('Akta tersebut'). Perayu kemudiannya telah ditangkap dan dituduh mengedar 2,600.7g heroin, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Semasa ditangkap perayu telah memberikan pernyataan beramaran kepada pegawai-pegawai kastam bahawa dia adalah pembawa tempat letak barang kemas yang tidak bersalah bagi pihak kawannya yang bernama Ismail dari Mumbai dan dia tidak mengetahui bahawa tempat letak barang kemas tersebut mengandungi dadah. Pihak pendakwaan berhujah bahawa perayu mempunyai milikan dan kawalan terhadap dadah tersebut semasa di kaunter kastam di KLIA, mempunyai pengetahuan tentang sifat dadah tersebut dan telah mengedar dadah tersebut. Pembelaan perayu semasa perbicaraan adalah ulangan apa yang telah dikatakan di dalam pernyataan beramarannya. Hakim perbicaraan telah menggunakan anggapan di bawah s 37(d) Akta dan mendapati perayu bersalah dengan pengedaran dadah. Ini merupakan rayuan perayu terhadap sabitan dan hukuman mati.

Diputuskan, menolak rayuan:

(1) Meskipun cap Jabatan Kimia yang telah diletakkan pada kotak didapati telah dibuka sebelum dadah telah dikemukakan sebagai ekshibit di dalam mahkamah, tiada apa-apa telah dibuktikan untuk menunjukkan bagaimana cap itu boleh dibuka. Keterangan menunjukkan bahawa selain daripada pelekat kotak yang terbuka, pelekat Jabatan Kimia pada 14 paket individu yang diperoleh daripada tempat letak barang kemas langsung tidak berusik. Selanjutnya, dadah-dadah boleh dikenalpasti daripada tanda pada paket-paket yang mengandungi dadah-dadah tersebut. Justeru, adalah jelas daripada keterangan bahawa ekshibit dadah tidak diusik atau tidak terdapat campur tangan terhadap ekshibit dadah atau bahawa terdapat pemutusan pada rangkaian kawalan bagi ekshibit-ekshibit seperti yang dicadangkan oleh perayu. Ekshibit-ekshibit dadah yang dikemukakan di mahkamah adalah ekshibit-ekshibit yang sama seperti yang dianalisa oleh ahli kimia (lihat perenggan 15).

(2) Hujahan perayu bahawa dia merupakan pembawa tidak bersalah telah ditolak dengan betul oleh hakim perbicaraan. Adalah tidak dapat dibayangkan bahawa rakan perayu Ismail akan meminta perayu untuk membawa tempat letak barang kemas tanpa memberitahunya kepada siapa tempat letak barang kemas tersebut harus diberikan atau siapa yang seharusnya mengambil tempat letak barang kemas tersebut daripadanya. Meskipun perayu telah mengulangi apa yang dikatakan di dalam pernyataan beramaran di dalam keterangan lisannya, adalah nyata bahawa pernyataan tersebut tidak boleh digunakan sebagai penyokong untuk keterangan lisannya (lihat perenggan 17).

(3) Berdasarkan alasan penghakiman hakim perbicaraan adalah jelas bahawa beliau telah mempertimbangkan pembelaan perayu dengan hati-hati dan teliti. Hakim perbicaraan juga telah menangani pembelaan dengan berpatutan sebelum membuat kesimpulan bahawa tindakan perayu tidak masuk akal di dalam keadaan ini. Kenyataan hakim perbicaraan bahawa perayu telah gagal untuk memanggil pembelaannya adalah dikesali, memandangkan adalah nyata bahawa tertuduh tidak menanggung beban untuk memanggil sebarang saksi di dalam pembelaannya. Walau bagaimanapun, dalam keadaan kes ini kenyataan hakim perbicaraan adalah tidak memudaratkan kepada kes pihak pembelaan, lebih-lebih lagi hakim perbicaraan telah berhenti separuh jalan dalam menggunakan sebarang inferens bertentangan terhadap perayu (lihat perenggan 18).

(4) Pada keseluruhan keterangan, pihak pembelaan telah membuktikan kes pengedaran dadah yang jelas melampaui keraguan yang munasabah oleh perayu, dengan membawa dadah-dadah dari Mumbai ke Kuala Lumpur di bawah s 2 Akta. Keterangan, iaitu paspot perayu, tiket penerbangannya, pas ketibaan dan tag bagasi, menunjukkan bahawa perayu seorang diri telah membawa dadah-dadah ke Kuala Lumpur. Oleh itu, perayu adalah dalam pegangan fizikal dadah-dadah yang telah disembunyikan di dalam tempat letak barang kemas. Justeru, sabitan dan hukuman yang dikenakan oleh hakim perbicaraan disahkan (lihat perenggan 19).]

Notes

For cases on break in chain of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1625–1642.

For cases on cautioned statement, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2734–2763.

For cases on trafficking, see 7(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577; [1998] 2 CLJ 1, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)

Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Tan Kok Ann [1996] 1 MLJ 89; [1996] 2 CLJ 96, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), (da), 39(1)(a), 39B(1), (2)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45A-128 of 2009 (High Court, Shah Alam)

V Aravindhakshan (G Suresh Ayangar & Associates) for the appellant.
Najib bin Zakaria (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] On 25 February 2009 at about 9.35pm the appellant was arrested by customs officers at Kaunter Pemeriksaan Kastam 'A' Unit Khas Pemeriksaan Penumpang 1 at the International Arrival Hall of Kuala Lumpur International Airport (KLIA) on suspicion of trafficking in dangerous drugs.

[2] The appellant, an Indian national, had arrived on an Air India flight from Mumbai. He was seen pushing a trolley which had a box ('P10') and a bag ('P11') placed on it. The appellant was pushing the trolley alone at all material times.

[3] At the counter, the appellant was instructed to open the box. On checking the contents of the box, officer R Elangovan ('SP2') found that it contained 14 'jewelry exhibitor stands' (the jewelry stands). SP2 took one of the jewelry stands out and shook it and heard a sound of 'bunyi seakan pasir'. The appellant was escorted to the customs office for further examination of the jewelry stands.

[4] SP2 opened one of the jewelry stands and discovered it contained packets of a white powdery substance. On testing it with a test kit the white powdery substance was found to be ketamine. After the rest of the jewelry stands had been prised open, officer Amaludin bin Gimin ('SP5') extracted the packets of white powdery substance from within the jewelry stands and placed them into 14 separate packets.

[5] The exhibits were sent to Jabatan Kimia Malaysia on 5 March 2010 for analysis. The chemist ('SP1') confirmed that the substance which weighed 3,998.5g, was ketamine, a dangerous drug listed under the Dangerous Drugs Act 1952 ('DDA').

[6] On arrest, the appellant gave a cautioned statement ('D30') to the customs officers stating essentially that he was an innocent carrier of the jewelry stands on behalf of a friend named Ismail from Mumbai and that he had no knowledge of the presence of the drugs.

[7] The appellant was subsequently charged with trafficking of 3,998.5g of ketamine (the said drugs), an offence under s 39B(1) and punishable under s 39B(2) of the DDA.

THE PROSECUTION'S CASE

[8] The prosecution's case was straightforward in that the appellant was found to be in possession and in control of the said drugs when at the customs counter at the KLIA. The prosecution relied on the presumption under s 37(d) of the DDA and proceeded on the basis that the appellant had knowledge of the nature of the said drugs and was trafficking in the said drugs as defined in s 2 of the DDA.

THE DEFENCE CASE

[9] At trial, the appellant in the main, gave evidence by repeating what he had said in his cautioned statement. He reiterated that he had been asked by a friend named Ismail in Mumbai to carry a box for him to Kuala Lumpur. The box was handed to him by Ismail at the Mumbai airport and he did not have the opportunity to open the box to examine the contents. He was merely told by Ismail that the box contained jewelry exhibitor stands and he was to carry it to Kuala Lumpur. For his efforts, the appellant was to be paid RM500 by Ismail. The appellant swore that he had no knowledge whatsoever that the jewelry stands contained the said drugs concealed in them. In fact the jewelry stands had to be prised open with a screw-driver before the said drugs were revealed.

FINDINGS OF THE LEARNED TRIAL JUDGE

[10] After a 8-day trial, the learned trial judge made the following main findings of fact as reflected in her grounds of judgment namely:

(a) the box (P10) had been checked in at Mumbai airport as the luggage of the appellant under his own name;

(b) the appellant was in custody, control and possession of the box (P10) containing the jewelry stands which had the said drugs concealed in them, at the time of arrest;

(c) the appellant was deemed to have knowledge of the nature of the said drugs when the court invoked the presumption under s 37(d) of the DDA; and

(d) the appellant was found guilty of having trafficked in the said drugs under s 2 of the DDA.

DECISION OF THE COURT

[11] Having read the record of appeal, in particular the petition of appeal, the written submissions of counsel for the appellant and the learned deputy public prosecutor ('DPP') and upon hearing the oral submissions of counsel and DPP aforesaid, the court was of the view that the learned trial judge had made the proper findings of fact and had applied the relevant law correctly.

[12] The court found that there was no merit in the appeal and accordingly no ground for the court to disturb the findings of the learned trial judge.

REASONS FOR THE DECISION

[13] From the record of appeal it is clear that the learned trial judge had made a maximum evaluation of the evidence at the close of the prosecution's case and found that the prosecution had established a prima facie case (see *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

[14] At the close of the defence case the learned trial judge had again evaluated the evidence of the defence and did not find any doubt cast on the prosecution's case. The learned trial judge having considered the defence case did not summarily dismiss the evidence of the appellant as contended by counsel for the appellant.

[15] In his submission, counsel for the appellant anchored his argument on the seal of the Chemistry Department placed on the box, which was found broken before the said drugs were produced as exhibits in court. The fact that the seal was broken was not disputed by the prosecution. In fact, Amaludin bin Gimin ('SP5') upon discovery of the broken seal a day before the hearing scheduled for 12 July 2010, lodged a police report ('P28') to that effect. Although it has not been established as to how the seal came to be broken, it is

clear from the evidence that there has been no tampering or interference with the exhibits or that there has been a break in the chain of custody of the exhibits or that there is a doubt as to the identity of the exhibits, as suggested by counsel for the appellant. This conclusion can be safely arrived at (from the evidence of SP1) as, apart from the broken seal on the box, the Chemistry Department's seal on the 14 individual packets within the box were not damaged at all. This clearly shows that the exhibits produced in court were the same exhibits that were analysed by the chemist ('SP1'). Further, it was confirmed by SP5 that the said drugs could be identified by his signature on the packets containing the white powdery substance.

[16] The court agrees with the learned trial judge that the appellant was guilty of 'wilful blindness' as described by the court in the case of *Public Prosecutor v Tan Kok Ann* [1996] 1 MLJ 89; [1996] 2 CLJ 96 when he did not take any steps to check and examine the contents of the box when it was handed to him by Ismail at the Mumbai airport, as alleged by the appellant. In *Tan Kok Ann* it was said that 'if a person deliberately shuts his eyes to the obvious because he does not want to know he is taken to know'. Taking for a moment the evidence of the appellant that the box was actually handed to him by Ismail at the airport in Mumbai can be accepted, there is no reason preferred as to why the appellant could not have asked Ismail any questions about the contents in the box. There was no suggestion that either Ismail or the appellant were late for the check in or was in such a hurry that the appellant had no time to open and check the contents of the box himself.

[17] The contention by the appellant that he was an innocent carrier was rightly rejected by the learned trial judge. Considering that the appellant was carrying the jewelry stands to Kuala Lumpur without even knowing whom to deliver to is most dumb founding and telling. The appellant did not even know whether anyone would collect the jewelry stands from him and if so, when and where. And if no one came forward to collect the jewelry stands from the appellant, no evidence was forthcoming as to what the appellant was to do with the jewelry stands. It is inconceivable that Ismail would pay RM500 to the appellant to carry the jewelry stands, which presumably must be of some value, to Kuala Lumpur without informing him as to whom to deliver to or who would be collecting them from him. The evidence of the appellant on this issue must be treated as an affront to common sense!

[18] In her grounds of judgment, the learned trial judge had considered the defence of the appellant carefully and in detail. The court is of the view that the learned trial judge had dealt with the defence appropriately and had arrived at the correct findings of fact, in particular:

(a) it was illogical for the appellant to have purchased the air ticket on 24 February 2009, for the flight to Kuala Lumpur on 25 February 2009,

A when he was not yet ready with all the goods said to have been ordered by Jaafar, considering that the sole purpose of the flight was to obtain and to deliver the goods to Jaafar. Further, there was no evidence to suggest that the appellant had to be in Kuala Lumpur with whatever goods available by the 25 February 2009. In fact, according to the appellant he was
B informed by Jaafar to delay his flight by 20 days but did not do so as he had been requested by Ismail to take the flight as scheduled;

(b) it was said in evidence that the appellant had travelled by air to Malaysia ten to 12 times previously. That being the case, the appellant can be
C considered to be a relatively seasoned traveler and would have known that the cost involved in the cancellation of an air ticket would be much higher than if he were to postpone his flight. Surely, he would not have needed Ismail to tell him that there would be a saving if he was to postpone his flight instead;

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(c) the appellant agreed to catch the flight on 25 February 2009 in any event as Ismail had offered to pay him RM500 to carry the said jewelry stands to Kuala Lumpur for him. What was not explained in evidence was why would the appellant have to catch the flight on behalf of Ismail for a
E 'reward' of RM500 when the appellant would in all probability have to make another journey to Kuala Lumpur to deliver the remaining goods to Jaafar. The conduct of the appellant did not make much commercial sense in the circumstances;

(d) in his cautioned statement the appellant said that Ismail had contacted
F him about a month before he carried the box (P10) for him whereas in evidence, the appellant said that he met Ismail by chance (*terserempak*) in Mumbai when he went there from Chennai to obtain the goods for Jaafar. This material discrepancy was not explained by the appellant; and

G (e) although the appellant had mentioned the name of Ismail in his cautioned statement, surprisingly the name of Ismail or of Jaafar for that matter, was not raised by the appellant during the cross examination of the prosecution's witnesses.

H **[19]** Counsel for the appellant in his submission referred to the appellant's cautioned statement on numerous occasions. However, it is trite that the appellant's statement cannot be regarded or taken to be corroborative of his oral evidence.

I **[20]** A statement in the grounds of judgment by the learned trial judge that the appellant had failed to call Jaafar as his witness is cause for concern as it is trite that an accused does not bear the burden of having to call any witness in his defence. However, in the circumstances of this case, the court is of the view that while the statement of the learned trial judge is unfortunate, it is not fatal

to the prosecution's case as the learned trial judge had stopped short of invoking any adverse inference under s 114(g) of the Evidence Act 1950 against the appellant.

[21] On the totality of the evidence, the court was satisfied that the prosecution had proved a case of direct trafficking beyond reasonable doubt, by the appellant by transporting the said drugs from Mumbai to Kuala Lumpur under s 2 of the DDA. In *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 (Privy Council) Lord Diplock in his speech said that ketamine is a listed scheduled drug under the DDA and the prosecution had rightly invoked the provision of s 37(d) of the DDA. In *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 the court held:

> The 'deemed' state of affairs in s 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under s 37(d) (and, for the matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law.

[22] Counsel for the appellant urged the court to reduce the charge to one of possession simpliciter under s 12(2) of the DDA on the ground that ketamine is not listed under s 37(da) of the DDA. The court did not consider this proposal as the prosecution did not rely on s 37(da) of the DDA at all. Further, the inference to be drawn from the presence of the large quantity of the said drug is that it was for the purpose of trafficking in them (under s 2 of the DDA) and not for the appellant's own consumption.

[23] All the evidence point to the appellant alone having transported the said drugs to Kuala Lumpur. The appellant had travelled using a passport bearing his own name ('P18'), on an air ticket of Air India flight MS 968 issued in his name ('P19'), was in possession of the boarding pass ('P20') and the check-in luggage tag ('P21') for the box (P10). The appellant was no doubt in physical possession of the said drugs which were cunningly concealed in the jewelry stands.

[24] The court was mindful of its duty to consider whether the defence of the appellant might reasonably be true, although not convinced of its truth (see *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577; [1998] 2 CLJ 1). Here, the court was of the view that the defence of the appellant may not reasonably be true.

[25] In the result, the court dismissed the appeal and confirmed the conviction and sentence imposed by the learned trial judge.

Appeal dismissed.

Reported by Kohila Nesan